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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-97

NORFOLK AND WESTERN RAILWAY CO., PETITIONER

v.

RICHARD NEMITZ, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

OPINIONS BELOW

The opinion of the court of appeals (App. II, at 179–193) is reported at 436 F. 2d 841. The opinions of the district court (App. I, at 19–36, 43–58) are reported at 287 F. Supp. 221 and 309 F. Supp. 575.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1971. The petition for a writ of certiorari was filed on March 15, 1971, and was granted on May 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In this case the court of appeals upheld the district court's jurisdiction on the ground that plaintiffs, who are employees of the Norfolk & Western Railway Company, were seeking damages for violation of an order of the Interstate Commerce Commission (see 49 U.S.C. 8 and 9). Although plaintiffs' action involves interpretation of the terms of a collective bargaining agreement, the court held that this 1962 agreement for the protection of employees became incorporated in the Commission's 1964 order approving N & W's application to merge;[1] the court so held on the ground that the Commission has a duty to review the adequacy of protective conditions in agreements entered into pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C. 5(2)(f)). This case, therefore, presents the question whether the Commission has such a duty and thus should be held to have incorporated the 1962 agreement into its later order so that plaintiffs' rights to protection from the adverse consequences of N&W's merger flow from a Commission order rather than from a collective bargaining contract.[2]

STATUTE INVOLVED

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f), provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a

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[1] *Norfolk & Western Ry. Co. and N.Y., C. & St. L. R. Co. Merger*, 324 I.C.C. 1.

[2] This is the only question to which this brief *amici curiae* is addressed.

carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

INTEREST OF THE AMICI CURIAE

This case raises important issues concerning the scope of the Interstate Commerce Commission's obligations under Section 5(2)(f) to protect employees affected by rail mergers and concerning the impact of a Commission order approving a merger upon prior and subsequent labor agreements. The court of appeals' interpretation of Section 5(2)(f) is directly contrary to the interpretation the Commission has consistently given it for many years. This is a matter of interest

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both to the Commission and to the United States, which is a statutory party in proceedings for judicial review of orders approving rail mergers.[3] The present question may well arise in connection with a substantial number of future and past rail mergers where the surviving railroad has agreements with employee representatives concerning employee protection.

STATEMENT

The four plaintiffs in this case are employees of the Norfolk and Western Railway Co. ("N&W") and members of Cedar Point Lodge No. 844 of the Brotherhood of Railroad Trainmen.[4] Until October 16, 1964, they were employed as brakemen in the Toledo Division of the Pennsylvania Railroad Company and worked on the Pennsylvania's Sandusky Line. This case concerns the effect of N&W's purchase of that line on the plaintiffs.

In applications filed with the Interstate Commerce Commission in 1961, N&W sought approval under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. 5(2), to merge with the New York, Chicago and St. Louis Railroad Company ("Nickel Plate"), to acquire control of the Wabash Railroad Company and lease its railroad line, and to purchase the Sandusky Line of the Pennsylvania Railroad Company.[5] The

[3] The United States has concluded, however, that its interest in the present case does not differ from that of the Commission.

[4] Plaintiffs sued on behalf of "approximately twenty-five" similarly situated members of Cedar Point Lodge No. 844 (App. I, at 5).

[5] *Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger*, 324 I.C.C. 1, 4–5.

Sandusky Line, extending from Columbus, Ohio, to the shores of Lake Erie at Sandusky, provided a connecting link between lines of the N&W and those of the Wabash and Nickel Plate; its acquisition gave N&W a direct route for marketing lake cargo and vessel fuel coal, the main commodities handled over the Sandusky Line.[6]

On June 24, 1964, the Interstate Commerce Commission, acting pursuant to Section 5(2) of the Act, approved the proposed transactions, including N&W's purchase of the Sandusky Line. 324 I.C.C. 1.

In January 1962, more than two years before the Commission's authorization but while the railroads' applications were pending, the N&W, the Brotherhood of Railroad Trainmen, and other unions, entered into an "Agreement For Protection of Employees in Event of Approval of Merger and Related Applications Filed by Norfolk and Western Company And Other Carriers" (App. I, at 60). The parties expressly executed the agreement "in accordance with the last sentence of Section 5(2)(f) of the Interstate Commerce Act" (App. I, at 62). In addition to incorporating the Washington Job Protection Agreement of 1936[7] with certain modifications, including a provision for arbitration of disputes, the 1962 agreement essentially provided for a voluntary "job freeze": jobs could not be eliminated

[6] *Id.* at 66, 83, 88.

[7] The Washington Agreement is described in *Railway Labor Ass'n* v. *United States*, 339 U.S. 142, 147 n. 7, and is published in Hearings held by the House Committee on Interstate and Foreign Commerce on H.R. 2531, 76th Cong., 1st Sess. 231-241 (1939).

as a result of the proposed transactions except through normal attrition and employees could not be dismissed for the sake of greater economy, although the carrier might transfer their work to a different location (App. I, at 62–69).[8]

Section 3 of the agreement related specifically to the Sandusky Line (App. I, at 67). Those who worked on that line were employees of the Pennsylvania Railroad. Their working territory consisted of the entire Toledo Division, of which the Sandusky Line was a part (App. II, at 179). The Sandusky Line did not operate year-round; when Lake Erie froze over during the winter, the line shut down (App. II, at 179–180). Thus, the Pennsylvania Railroad employees who had exercised employment rights on the Sandusky Line worked there when work was available, but during slack seasons and at other times they could exercise their seniority rights and work elsewhere in the Toledo Division (App. II, at 179–180). Section 3 of the 1962 agreement provided that N&W would employ all employees represented by the signatory unions who "have exercised employment rights on said Sandusky Line" and who, at the time of the acquisition, "elect to accept such employment" (App. I, at 67). Section 3 further stated that "none of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment" except that N&W would not be obligated to provide employment "of greater duration than such employee enjoyed on said line in the twelve

[8] See also 324 I.C.C. at 106.

months' period immediately preceding the effective date of said acquisition" (App. I, at 67). Employees would not be protected against any "furlough because of reduction in forces due to seasonal requirements as aforesaid or decline in volume of traffic or revenues" (App. I, at 68). Also, N&W would assume responsibility for all labor agreements relating to the Sandusky Line,

> other than provisions therein (1) granting employees employed on said Line seniority or employment rights beyond said Line and (2) granting seniority or employment rights on said Line to employees having employment rights beyond said Line * * * subject to changes in accordance with the provisions of the Railway Labor Act * * *. [App. I, at 68.][9]

In recommending that the railroads' applications be approved, the Commission's hearing examiner noted that N&W had entered into an agreement with the labor unions, and stated that "In view of this agreement, no conditions need be imposed under any authority granted herein for the protection of those employees covered by such agreement." 324 I.C.C. at 106. The Commission, in authorizing the transactions, referred to these collective bargaining agreements and made its authorization "subject to such agreements." 324 I.C.C. at 50. For the benefit of employees not covered by the 1962 agreement, the Commission imposed a detailed set of protective conditions pursuant to the first two

[9] Following the Commission's approval of the merger, N&W and the unions also entered into various implementing agreements (App. I, at 83).

sentences of Section 5(2)(f); these conditions included dismissal allowances, lump-sum separation allowances, moving expenses, and other protections.[10]

After plaintiffs elected to become employees of N&W on the Sandusky Line, they received less work than they had received while they were with the Pennsylvania Railroad, where they worked not only on the Sandusky Line, but also throughout the Toledo Division. They requested N&W to compensate them for the difference between their average monthly wage as employees of the Pennsylvania Railroad over the entire Toledo Division in the twelve months preceding the merger, and what they earned per month working for N&W (App. I, at 11–13). N&W said it would pay only the difference between plaintiffs' N&W wages and their average monthly wages on the Sandusky Line alone in the twelve-month period before the acquisition (*id.*), and denied further compensation on the basis of its interpretation of the 1962 agreement. But by October 1965, N&W had failed to pay even this amount because it had not yet received sufficient wage data from the Pennsylvania Railroad. After the Brotherhood of Railroad Trainmen threatened to invoke arbitration under Section 1(d) of the 1962 agreement (App. I, at 102–106), the parties entered into Implementing Agreement I–A on October 25, 1965 (App. I, at 85–88). This provided that until N&W received sufficient data to calculate the employees' earnings on the Sandusky Line during the

[10] 324 I.C.C. at 50, incorporating by reference the conditions in *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557; 317 I.C.C. 729; 320 I.C.C. 377.

year before the acquisition, N&W would figure each employee's average monthly compensation for that period on the basis of 75 percent of his earnings throughout the Toledo Division. If he had been earning less than 75 percent at N&W, he would be paid the difference by N&W.[11]

Plaintiffs were still dissatisfied because, in their view, the contract required their minimum average monthly wage to correspond to their prior earnings not just on the Sandusky Line, but throughout the Toledo Division (App. I, at 129–130). Pursuant to a memorandum of understanding between the unions and N&W (App. I, at 77–79), entered into at the time of the 1962 agreement, plaintiffs submitted their claims to the local chairman of their union. When the local chairman declined to pursue the claims on the ground that the employees were not entitled to greater compensation under the 1962 agreement, plaintiffs appealed to the National Board of Appeals of the Brotherhood of Railroad Trainmen. After holding a hearing and considering numerous exhibits, the Board, on September 16, 1966, rejected the claim and refused to seek arbitration with N&W. The Board of Appeals stated that arbitration was inappropriate since "there is no such disagreement between our Brotherhood and Norfolk and Western" (App. I, at 149), and that the 1962 agreement had expressly provided that N&W "shall not be required to provide employment or compensation * * * of greater duration or amount than

[11] When N&W finally calculated an employee's actual average monthly wage on the Sandusky Line, any overpayments would have to be paid back to N&W (App. I, at 90–91).

was performed by and paid for to the Sandusky Line employees * * *" (App. I, 148).

Plaintiffs then commenced the present action in the district court under Section 9 of the Interstate Commerce Act, 49 U.S.C. 9, on the theory that N&W had acted contrary to the 1962 agreement, that the Commission had incorporated the agreement in its 1964 order authorizing N&W's purchase, and that N&W had therefore violated an order of the Interstate Commerce Commission. The district court agreed (App. I, at 43–58). The court of appeals affirmed (App. II, at 179–193), holding that under Section 5(2)(f) of the Act the Commission is required to provide protection for affected employees whether or not a prior agreement exists between the employees' representative and the railroad (*id.* at 185). Accordingly, the court construed the Commission's report as having "first determined that the protective conditions in the 1962 agreement were adequate" and having then incorporated them in the order (*id.* at 185–186).

SUMMARY OF ARGUMENT

The first two sentences of Section 5(2)(f) of the Interstate Commerce Act require the Interstate Commerce Commission, as a prerequisite to approving a transaction under Section 5(2), to impose protective conditions for the benefit of railroad employees affected by the transaction. The last sentence of Section 5(2)(f), however, provides that "Notwithstanding any other provisions of this Act" the carrier and the representatives of the affected employees may enter into a collective bargaining agreement pertain-

ing to the protection of the employees. The Commission has interpreted Section 5(2)(f) to mean that when the union has negotiated a protective agreement with the carrier, the Commission has no responsibility to review that agreement under Section 5(2)(f) because such an agreement in itself satisfies the requirements of that Section. The legislative history of Section 5(2)(f) supports the Commission's view that, by adding the "Notwithstanding" clause, Congress intended to allow such agreements to be freely negotiated without being subject to Commission review under that Section.

At the time Congress passed Section 5(2)(f), all but a small percentage of the railroad employees in the country were protected from the effects of mergers and similar transactions by the Washington Job Protection Agreement of 1936. By requiring the Commission to impose protective conditions, Congress intended in the first two sentences of Section 5(2)(f) to grant similar protection to employees not covered by the Washington Agreement. But Congress did not intend to require the Commission to review the adequacy of agreements the unions and railroads might enter into in the future. The unions themselves drafted the "Notwithstanding" clause; in view of the unions' expressed desire to preserve free collctive bargaining with respect to employee protection, it is reasonable to conclude that the very purpose of that clause was to make clear that freely negotiated agreements would not be subject to Commission review under Section 5(2)(f). In addition, when Congress passed Section 5(2)(f),

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many of the nation's railroads were in bankruptcy. In these circumstances, Congress clearly did not intend to require the Commission to demand employee protection according to the first two sentences of Section 5(2)(f) if the union would agree to less so that the carrier could merge in order to avoid shutting down and if requiring greater employee protection might make it financially impossible for the carrier to merge at all.

The decision of the court of appeals would require the Commission to intrude on the collective bargaining process by altering the terms of previously negotiated agreements. The result would necessarily be to discourage settlement of these matters in the future through negotiation, and thus would contravene the strong congressional policy in favor of having labor differences settled through collective bargaining rather than having agencies or courts impose settlements on labor and management. The Commission's consistent practice for three decades in refusing to review negotiated agreements promotes collective bargaining and avoids Commission intervention in labor-management relations, an area where it has no special expertise. The Commission is responsible for administering Section 5(2)(f); the courts should thus give great weight to its long-standing interpretation of that Section.

Since the Commission did not review the agreement in this case under Section 5(2)(f), and since it had no responsibility to do so, the court below erred in upholding the district court's jurisdiction on the ground that the Commission must have incorporated

the terms of the previously negotiated agreement in its order approving N&W's acquisition of the Sandusky Line. The employees' rights to protection flowed from the collective bargaining agreement, not the Commission's order, and the district court therefore did not have jurisdiction over plaintiffs' claims for damages under 49 U.S.C. 9.

ARGUMENT

I. THE LAST SENTENCE OF SECTION 5(2)(F) OF THE INTERSTATE COMMERCE ACT ALLOWS A RAILROAD AND THE REPRESENTATIVES OF ITS EMPLOYEES TO REACH A FREELY NEGOTIATED AGREEMENT ON EMPLOYEE PROTECTIVE CONDITIONS WHICH IS NOT SUBJECT TO COMMISSION REVIEW UNDER THAT SECTION

In the Transportation Act of 1940, Congress revised Section 5 of the Interstate Commerce Act to empower the Commission to authorize voluntary railroad mergers and other financial transactions. While hoping that such transactions would bring about much-needed economies in railroad operations, Congress at the same time realized that reducing jobs on the merging lines for the sake of efficiency could place a severe burden on the affected employees. In the first two sentences of Section 5(2)(f), Congress therefore directed the Commission to include protective conditions for employees in its orders authorizing transactions under Section 5(2). In the last sentence of Section 5(2)(f), however, Congress provided that "Notwithstanding any other provision of this Act" carriers and unions could enter into agreements pertaining to the protection of the interests of the affected employees.

This case involves the effect of a collective agreement entered into pursuant to the last sentence of Section 5(2)(f) on the Commission's responsibility under the first two sentences of that provision. The court of appeals held that the Commission must review every such agreement to determine whether the union has negotiated adequate protection for its members. In the Commission's view, however, Section 5(2)(f) requires it to impose protective conditions only if the representatives of the affected employees have not entered into a protective agreement with the carriers; if such an agreement has been negotiated pursuant to the last sentence of Section 5(2)(f), the Commission has no responsibility to review it under the first two sentences of that Section.

A. BACKGROUND OF CONGRESS' CONSIDERATION OF LEGISLATION LEADING TO ENACTMENT OF THE TRANSPORTATION ACT OF 1940

Mr. Justice Frankfurter's observation that "words acquire scope and function from the history of events which they summarize," [12] is particularly pertinent to Section 5(2)(f). That provision is the culmination of a decade of experience, during which the carriers, the unions, and the government sought a solution to the economic troubles that beset the railroads.[13]

The economic depression of the 1930's had a devas-

[12] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 186.

[13] The events leading to enactment of the Transportation Act of 1940 are discussed in an Appendix to the Court's opinion in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 315.

tating impact on the railroad industry. By 1932, business had been cut in half, half of the railroads' employees had been laid off, many lines had declared insolvency, and even the strongest were struggling to avoid bankruptcy court.[14] Congress responded by passing the Emergency Railroad Transportation Act of 1933, 48 Stat. 211. The Act created an Office of Federal Coordinator of Transportation and, among other things, sought to encourage coordination of carrier activity for the purpose of eliminating waste and needless expense. Section 7(b), however, prevented carriers from reducing the number of their employees as a result of action taken pursuant to the Act and guaranteed that no employee would "be in a worse position with respect to his compensation" as a consequence of such action.

The Emergency Act continued in effect until 1936. During these three years the Act brought about little railroad coordination and still less improvement in the condition of the railroad industry.[15] On February 1, 1936, after efforts to secure voluntary action had failed, Joseph B. Eastman, the Federal Coordinator of Transportation, announced that he would shortly order unification in twelve different railroad terminals.[16] The proposed order caused great concern throughout the industry. Carriers threatened to challenge the Coordinator's authority in court; the unions

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[14] See Van Metre, *Transportation in the United States* 337 (1939).

[15] See generally Latham, *The Politics of Railroad Coordination 1933–1936* (1959).

[16] *Id.* at 244, 245.

sought legislation to prevent any reduction in railroad employment. Finally President Roosevelt intervened and urged both sides to settle their differences through collective bargaining. His letter to the carriers and the unions stated in part:

> The Emergency Railroad Transportation Act, 1933, undertook to promote the elimination of railroad waste and at the same time protect the employees. This protection is now satisfactory neither to the companies nor to the employees * * *. It is a matter which is capable of being settled to better advantage by negotiation than by legislation. Given sufficient time the management, and the men ought to be able to agree in their common interests upon a reasonable plan of protection.[17]

Negotiations ensued and on May 31, 1936, the parties announced the signing of the Washington Job Protection Agreement. This Agreement, which covered approximately 85 percent of the railroad mileage in the country,[18] was to be in effect for five years from June 18, 1936, and was to continue in effect thereafter, although a carrier or union could then withdraw one year after giving notice. The Agreement provided that employees who continued in service after a coordination would not be placed in a worse position with respect to their compensation for five years after the effective date of

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[17] The letter is reprinted in Hearings on H.R. 2531 before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., at 1721–1722 (1939).

[18] Statement of George M. Harrison, in Hearings, *supra* note 17, at 216.

the transaction.[19] Employees dismissed as a result of the coordination would receive a "coordination allowance" of 60 percent of their average monthly pay prior to the transaction. The period of payment depended on the employee's length of service: for example, those with one to two years of seniority would receive an allowance for 6 months; employees with more than 15 years service would be paid for 60 months.[20] An employee's dismissal allowance could be reduced only by other railroad earnings. After the Agreement had been signed, the carriers and the unions joined in urging that the Emergency Transportation Act of 1933 be allowed to expire in 1936.[21]

B. LEGISLATIVE HISTORY OF SECTION 5(2)(F) OF THE INTERSTATE COMMERCE ACT

When the condition of the railroad industry showed no signs of improving, President Roosevelt appointed, in 1938, a Committee consisting of three railroad executives and three representatives of railway labor (the "Committee of Six") to recommend legislation. In December 1938 the Committee of Six submitted its report to the President. Although the Coordinator of Transportation under the 1933 Emergency Act would have required railroad consolidations as a means of achieving efficiencies in operation,[22] the Committee of Six rejected this approach and suggested instead an easing of restrictions on mergers and consolidations

[19] The Agreement is reprinted in Hearings, *supra* note 17, at 231–241.

[20] *Id.* Section 7.

[21] Latham, *supra*, note 15, at 244–266.

[22] See S. Doc. No. 119, 73d Cong., 2d Sess. 30–33, 36–37, 86–88.

voluntarily entered into by the carriers.[23] In early 1939, with approximately one-third of the railroad mileage in the country in bankruptcy,[24] Congress began consideration of legislation that eventually led to passage of the Transportation Act of 1940, and, specifically, Section 5(2)(f) of the Interstate Commerce Act, the provision at issue in this case.

The bill (H.R. 2531) initially considered by the House Committee on Interstate and Foreign Commerce included standards for the approval of mergers and other transactions, but contained no provision for the protection of workers affected by these transactions. Joseph B. Eastman, a member of the Interstate Commerce Commission and formerly Coordinator of Transportation under the Emergency Act of 1933, explained that such a provision was unnecessary because the matter could properly be handled by negotiation, as the Washington Job Protection Agreement illustrated.[25] The Committee of Six, however, recommended a provision that would require the Commission to demand, "as a prerequisite to its approval a fair and equitable arrangement to protect the in-

[23] Report of Committee Appointed September 20, 1938, by the President of the United States to Submit Recommendations upon the General Transportation Situation, December 23, 1938, pp. 30–32, reprinted in Hearings, *supra* note 17, at 259–308.

[24] Statement of George M. Harrison, in Hearings, *supra* note 17, at 208; see also 86 Cong. Rec. 10184 (1940).

[25] Hearings, *supra* note 17, at 1722. As Federal Coordinator, Eastman had recommended that the problem be settled by agreement after negotiation between the unions and the carriers. See *Fourth Report of the Federal Coordinator of Transportation on Transportation Legislation*, H. Doc. No. 394, 74th Cong., 2d Sess. 50–58 (1936).

terests" of the affected employees.[26] George M. Harrison, chairman of the Railway Labor Executives Association and a member of the Committee of Six, testified on behalf of the Committee. After referring to the Washington Job Protection Agreement of 1936, and stating that the Agreement had worked out "very satisfactorily," Harrison explained why the Committee had recommended legislation for the protection of employees:

> Well, you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 percent of the mileage of the country refuses to come into the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when the changes are made.
>
> Now, the exact formula of that, of course, I am not here prepared to suggest, but at least we have solved that problem through collective bargaining with management and if we could get all of the roads into the agreement we would not even suggest any protection as a matter of law. [*Id.* 216–217.]

When asked whether the Washington Agreement had been satisfactorily maintained, Harrison replied that

[26] Hearings, *supra* note 17, at 275.

although some employees "do not believe it is as liberal as it ought to be," nevertheless

> We have settled the question through collective bargaining and if it is not satisfactory, the burden is on us to proceed in the same way to try to change it. [*Id.* at 243.]

Harrison summed up the reasons for the Committee's proposal with respect to employee protection by stating how he would explain it to the carriers that had signed the Washington Job Protection Agreement:

> "We have settled that question with you, and you are willing to accept it."
>
> "We have got some roads, however, that have not come in and you have tried to get them in and you have not succeeeded. So we have to reach them through legislation." [*Id.* at 244.]

The bill introduced and passed in the Senate (S. 2009) contained the provision regarding a "fair and equitable" arrangement that the Committee of Six had recommended. 84 Cong. Rec. 6158 (1939); see S. Rep. No. 433, 76th Cong., 1st Sess. 29. The bill introduced in the House contained a similar provision (see H.R. Rep. No. 1217, 76th Cong., 1st Sess. 12), but during the floor debate Representative Harrington introduced an amendment adding a requirement that the Commission withhold approval if the consolidation would displace workers, or impair their employment rights. 84 Cong. Rec. 9882 (1939). The amendment was agreed to (*id.* at 9887), and the House passed the bill in that form (*id.* at 10127). The Conference Committee, however, eliminated both the Harrington Amendment and the "fair and equitable" language, along

with the entire amendment relating to Commission approval of voluntary railroad mergers and other transactions. H.R. Rep. No. 2016, 76th Cong., 3d Sess. 61 (1940).

The House voted to recommit with instructions to the House managers to restore the "fair and equitable" language and to insist on a revised version of the Harrington Amendment, which closely resembled the final Section 5(2)(f)—"[the] transaction will not result in employes of said carrier * * * being in a worse position with regard to their employment." 86 Cong. Rec. 5886. The House also inserted the "Notwithstanding" clause, which is now the last sentence of Section 5(2)(f). As discussed below, the unions themselves drafted this sentence. Representative Harrington, in urging recommittal, commented that the revised "provision also contains a clause that permits the industry, through the processes of collective bargaining, to work out its problems in a democratic manner." 86 Cong. Rec. 5871. The Conference Committee adopted a modified version of the recommitted House bill (*id.* at 10149–10150), and the House passed it in that form (*id.* at 10194).[27]

The debate on this final version never directly focused on the relationship between the "Notwithstanding" clause and the first two sentences of Section 5(2)(f). Representative Wolverton, a House conferee, did note that some labor representatives had been un-

[27] The legislative history of the first two sentences of Section 5(2)(f) is discussed in *Railway Labor Assn.* v. *United States*, 339 U.S. 142, and *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169.

certain whether the Harrington Amendment would preclude voluntary collective bargaining agreements in the future, and that the one brotherhood that had opposed the consolidation provision had done so on the basis that the matter should "be left at this time as a matter for collective bargaining." 86 Cong. Rec. 10189. Representative Lea said that the "Notwithstanding" clause confirmed the "right of employees to enter into agreements with railroads to take care of them in case of unemployment as a result of consolidations," and that employees were not precluded from making an agreement with a carrier for a period of protection longer than the four-year period provided in the bill. *Id.* at 10178. Representative Halleck was of the opinion that the first two sentences of Section 5(2)(f) gave greater protection than the Washington Job Protection Agreement, the principle of which that Section "writes into law." *Id.* at 10187.

C. THE COMMISSION'S INTERPRETATION OF SECTION 5(2)(f) COMPORTS WITH THE CONGRESSIONAL OBJECTIVES REFLECTED IN THAT SECTION'S BACKGROUND AND LEGISLATIVE HISTORY

The series of events preceding Congress' consideration of the Transportation Act of 1940 and the legislative history of Section 5(2)(f) confirm the Commission's long-standing interpretation that the last sentence of that provision permits a railroad and the representatives of its employees to reach a freely negotiated collective agreement on employee protective conditions which is not subject to Commission review under that Section.

First, as the testimony of George Harrison on behalf of the Committee of Six makes clear, the initial proposals for employee protection were made because some carriers refused to be governed by the Washington Job Protection Agreement of 1936. See p. 19, *supra*. Mr. Harrison emphasized that there was no intention to alter the terms of the Agreement itself, that this should be done, if at all, by collective bargaining and that the proposed legislation was aimed at the employees who were unprotected by that Agreement. There is simply no indication that anyone saw a need to have the Commission review the adequacy of negotiated agreements. To the contrary, the theme running through the hearings, the committee reports and the floor debates was that the collective bargaining process worked quite well when the carriers allowed the process to work at all. But some carriers refused to negotiate, thereby leaving their employees unprotected. This was the mischief sought to be remedied by the proposed legislation.

Second, as mentioned above, union representatives themselves drafted the "Notwithstanding" clause. Once the conferees had reported out the bill entirely excluding a revised consolidation section and further labor protective provisions, the unions agreed among themselves on the scope of the protection they desired and sent a letter to each member of Congress requesting that the consolidation section be reinserted along with revised protection for railroad labor, including

the last sentence of the present Section 5(2)(f).[28] The proposed protection was revised by the conferees, but the "Notwithstanding" clause of the final sentence remained as the unions had drafted it. Thus, in view of the unions' expressed desire to preserve their right to free collective bargaining[29] and the fact that the unions themselves drafted the "Notwithstanding" clause of Section 5(2)(f), it is reasonable to conclude that Congress did not intend to require the Commission to review the unions' voluntary collective bargaining agreements and that the unions insisted on the last sentence of that Section in order to make this clear.

Finally, it is significant that at the time Congress enacted Section 5(2)(f), nearly one-third of the nation's railroads were in the hands of receivers or trustees (see p. 18, *supra*). Some railroads today may be on the brink of shutting down, and, in the future, might be able to save themselves only by merging. Compare *New Haven Inclusion Cases*, 399 U.S. 392, 407–408. Suppose, for example, that such a carrier could not merge at all if it had to absorb the financial burdens of providing compensation for four years for employees dismissed as a result of the merger, and suppose also that the union, knowing this, enters into an agreement

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[28] Congressman Lea discussed the letter and the unions' proposal, which had been incorporated in a motion to recommit, in a speech of May 3, 1940 (86 Cong. Rec. A2684–A2685). The full text of the letter, including the unions' acknowledgment of authorship of the proposed revision, appears in the magazine *The Railroad Trainman*, vol. 57, p. 342 (June 1940).

[29] See Statement of Representative Harrington, quoted at p. 21 *supra*.

with the carrier for employee protection of three years instead of four as provided in the second sentence of Section 5(2)(f). Under the decision of the court of appeals in this case, the Commission would have to review this agreement, declare it inadequate under Section 5(2)(f), and require protection for four years. As a result, the carrier might be forced to shut down, to the detriment of all concerned. In light of the economic crisis facing the railroad industry in 1940, the carriers and the unions could not have contended for such a result and Congress, we submit, did not intend to require it. Instead, Congress must have intended to allow the Commission to authorize a merger in these circumstances, particularly since the congressional purpose in revising Section 5 in 1940 was to facilitate railroad mergers, see *County of Marin* v. *United States*, 356 U.S. 412, 416. Under the Commission's interpretation of Section 5(2)(f), authorization would be possible, because the collective bargaining agreement would stand as negotiated.

D. THE COMMISSION'S INTERPRETATION OF SECTION 5(2)(f) IS ALSO SUPPORTED BY CONSIDERATIONS OF POLICY AND OF PRACTICALITY AND BY A CONSISTENT COURSE OF ADMINISTRATIVE CONDUCT

In addition to the background and legislative history of Section 5(2)(f), other considerations support the Commission's construction of that provision. The Commission's "experience and expertise is with transportation not labor relations problems."[30] The Com-

[30] *Outland* v. *Civil Aeronautics Board*, 284 F. 2d 224, 228 (C.A.D.C.) (Burger, J.); see *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 173. *Outland* involved whether the Civil Aeronautics Board should impose terms with respect to senior-

mission has acted in the past only in the absence of agreement. Imposing compulsory settlements in job security matters runs contrary to the long-established congressional policy, reflected in the Railway Labor Act, 45 U.S.C. 151 *et seq.* (and the National Labor Relations Act, 29 U.S.C. 158(d)), of relying on negotiation rather than litigation before courts or agencies. Compare *General Committee* v. *M.K.T.R. Co.*, 320 U.S. 323, 337. As this Court recently observed in regard to the Railway Labor Act, there is a "strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements." *Chicago & N.W.R. Co.* v. *Transportation Union,* No. 189, October Term 1970, decided June 1, 1971, slip op. at p. 9 n. 11.

The danger in imposing upon the Commission the duty to follow a contrary policy by reviewing labor agreements under Section 5(2)(f) is evident. Collective bargaining involves mutual give-and-take in an

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ity to protect employees affected by a merger. The court observed that the Board "has not seen fit to assume that burden and has held that the issue should be resolved by negotiation or arbitration." 284 F. 2d at 228. If the unions and the carriers fail to reach agreement, the Board will appoint an arbitrator to decide what terms would be "just and reasonable" under 49 U.S.C. 1378(b) (compare the first sentence of Section 5(2)(f) of the Interstate Commerce Act). See also *American Airlines, Inc.* v. *Civil Aeronautics Board*, C.A. 2, No. 1083, decided July 23, 1971, upholding the Board's practice in this regard and stating that "If the Board's experience convinced it that the integration of the seniority lists of employees of merging carriers was a function which it was not well suited to perform and which, in the absence of agreement, had best be left to arbitration, that was a judgment it was competent to make." Slip op., at p. 4498.

effort to reach an agreement acceptable to both sides. A union, for example, may opt for greater employment security; the carrier may accept the union's terms in return for a lessening of the period during which it is obligated to provide compensation. If the Commission, or a court for that matter, reviews the resulting agreement according to some minimum standard [31] and then requires that compensation be paid for a longer period than had been agreed upon, the entire collective bargaining process has been upset: The carrier has given in on job security but has received nothing in return. We do not say this is necessarily the situation in the instant case. It is the Commission's position that it should not, in ordinary circumstances (see p. 32, *infra*), review and interpret labor agreements and the Commission has not done so here. But the point remains that the kind of intrusion in the collective bargaining process demanded by the decision of the court below not only frustrates the expectations of the parties, but also, and more important, discourages others from settling these matters through negotiation in the future.

To be sure, in the absence of an agreement protecting affected employees, the Commission must, under

[31] The holding below presumably would require the Commission to decide whether, on balance, a collective bargaining agreement provides protection that is substantially equal to or greater than the protection that would have been obtained under Section 5(2)(f) in the absence of agreement. But we do not believe Congress intended the Commission to engage in such second-guessing of the negotiators' judgment concerning the relative importance of various aspects of employee protection in the particular circumstances of each consolidation.

Section 5(2)(f), impose terms and conditions. But even in such cases the Commission often adopts the terms of previously negotiated agreements, with necessary modifications, and requires that all disputes over the conditions be arbitrated.[32] Indeed, over the years the conditions imposed by the Commission under Section 5(2)(f) have become fairly standardized.[33] The carriers and the unions therefore have a firm idea of what the Commission will require as a condition to its authorization if there is no collective bargaining agreement and their negotiations thus take place in a context in which the adoption of variations from the Commission's standard approach would presumably be deliberate.

Finally, ever since the enactment of Section 5(2)(f) in 1940 it has been the Commission's position that protective agreements entered into pursuant to the last sentence of that provision are not subject to review under that Section. In the first reported case under Section 5 involving such an agreement between rail labor and rail management, decided in 1941 less than one year after that provision had been amended by Section 5(2)(f), the Commission stated that "no condition as to employment is necessary."[34] More recently

[32] See, *e.g.*, *Oklahoma Ry. Co. Trustees Abandonment*, 257 I.C.C. 177, 193; *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 317 I.C.C. 557, 566–567; *id.*, 317 I.C.C. 729, 730.

[33] See generally *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 159–164.

[34] *Missouri Pac. R. Corp. in Nebraska Trustee Operation*, 247 I.C.C. 653, 657; see also *Gulf, M. & O. R. Co. Purchase*, 261 I.C.C. 623, 625–626; *International-G.N.R. Co. Trustee Trackage Rights*, 282 I.C.C. 30, 36; *Norfolk & Western Ry. Co. Merger, Etc., Virginian Ry. Co.*, 307 I.C.C. 401, 439; *Duluth S.S. & A.R. Co. Merger*, 312 I.C.C. 341, 356–357.

the Commission found in a major proceeding that the interests of employees would be protected by the agreements they had reached, and added, "Under the terms of the last sentence of section 5(2)(f), the entering into such agreements takes from us the obligation of providing protection for employees covered thereby." [35]

Indeed, even though the Washington Agreement of 1936 is not included within the last sentence of Section 5(2)(f) because it was entered into before enactment of that Section,[36] the Commission has held that Section 5(2)(f) did not divest employees of their rights under that Agreement if they are still covered by it.[37] Thus, when the Commission imposes terms and conditions in the absence of a protective agreement under Section 5(2)(f), such employees retain any fur-

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[35] *Great Northern Pac.—Merger—Great Northern Ry. Co.*, 331 I.C.C. 228, 278. The Commission carefully distinguished its duty under the first two sentences to provide protection to employees not covered by the agreements.

Other cases in which the Commission protected employees not covered by voluntary agreements include *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207, 235, 253; *Gulf, M. & O. R. Co. Purchase, Securities*, 267 I.C.C. 265, 276–277; *Chicago, B. & Q. R. Co. Trackage Rights*, 271 I.C.C. 675, 690–691; *Houston Belt & Term. Ry. Co. Control*, 275 I.C.C. 289, 318; *Detroit, T. & I. R. Co. Control*, 275 I.C.C. 455, 487; *Savannah & A. Ry. Co. Control*, 282 I.C.C 39, 57–58; *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 544–546.

[36] The last sentence of Section 5(2)(f) refers only to protective agreements "hereafter" entered into.

[37] See *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 166–171, on remand from the decision of this Court in *Railway Labor Executives' Ass'n* v. *United States*, 379 U.S. 199.

ther right to protection agreed to in the Washington Agreement, although they may not receive duplicate benefits.[38]

The Commission's consistent practice in administering Section 5(2)(f) over a period of more than three decades is entitled to great weight when, as here, a court is faced with determining the meaning of that provision. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16.

II. PLAINTIFFS' RIGHTS TO PROTECTION FROM THE EFFECT OF N&W'S ACQUISITION FLOWED FROM COLLECTIVE BARGAINING AGREEMENTS, NOT FROM AN ORDER OF THE COMMISSION, AND THE DISTRICT COURT THEREFORE HAD NO JURISDICTION UNDER 49 U.S.C. 9

In the instant case, therefore, the Commission's statement that no conditions were necessary, 324 I.C.C. at 50, 106, meant only that its duty to protect employees under Section 5(2)(f) had been satisfied by the 1962 agreement. The Commission did not review that agreement in light of Section 5(2)(f) and did not adopt it. As will appear below, the Commission might have considered whether the terms of the agreement rendered the entire transaction inconsistent

[38] See *Southern Ry. Co.*, *supra*, 331 I.C.C. at 169. In accordance with its consistent interpretation of Section 5(2)(f), the Commission noted that the carriers had submitted "proposals to enter into agreements with employees" and that if "the parties agreed to these proposals suggested by applicants, our duty under Section 5(2)(f) would cease," 331 I.C.C. at 176. Since the parties had not agreed, the Commission imposed protective terms and conditions.

with the public interest,[39] but the Commission could not, consistent with the final sentence of Section 5 (2)(f), interfere in the agreement reached for the protection of employees through their authorized representatives. It follows that the court of appeals erred in holding that since the Commission has a duty under Section 5(2)(f) to review previously negotiated agreements pertaining to employee protection, the Commission must have reviewed the 1962 agreement, found it adequate, and then incorporated it in the order authorizing the merger (App. II, at 184–187). The court similarly erred in holding that Implementing Agreement I–A, executed in 1965, violated the Commission's 1964 order.[40] Therefore, since plaintiffs' action relates solely to the breach of a collective bargaining agreement, which had not been incorporated in an order of the Commission, the district court did not have jurisdiction of plaintiffs' claims under 49 U.S.C. 9, which allows private persons to bring actions for damages in the district courts against carriers

[39] See, *e.g.*, *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 544.

[40] See *Arnold* v. *Louisville & Nashville R.R. Co.*, 180 F. Supp. 429 (M.D. Tenn.), affirmed *sub nom. Batts* v. *Louisville & Nashville R.R. Co.*, 316 F. 2d 22 (C.A. 6), holding that employees could, through collective bargaining agreements with the carrier entered into after the Commission's order, revise the terms and conditions imposed by the Commission for their protection. Compare *Clemens* v. *Central R.R. Co. of N.J.*, 264 F. Supp. 551 (E.D. Pa.), reversed, 399 F. 2d 825 (C.A. 3), certiorari denied, 393 U.S. 1023. The Commission's brief as *amicus curiae* in the district court in *Clemens* is reprinted in App. I, at 164–175.

only for violation of the Interstate Commerce Act and Commission orders.

This is not to say that the Commission had no power to adopt further conditions under Section 5(2)(b) of the Act, 49 U.S.C. 5(2)(b), which requires as a prerequisite to Commission approval that, subject to such terms and conditions as the Commission shall find to be "just and reasonable," the proposed transaction will be "consistent with the public interest." Although the 1962 agreement relieved the Commission of any duty to act under Section 5(2)(f), the Commission retained, and still retains under Section 5(9) of the Act, 49 U.S.C. 5(9),[41] the power to supplement the protection afforded under Section 5(2)(f).[42] Indeed, in the complete absence of Section 5(2)(f), the Commission would have discretionary authority to protect rail labor;[43] Section 5(2)(f) does not limit the Commission's authority to grant greater protec-

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[41] See *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 172, n. 2.

[42] Compare *Pennsylvania R. Co.—Merger—New York Central R. Co.*, 327 I.C.C. 475, 544:

> The last sentence of Section 5(2)(f) of the act provides that, notwithstanding any other provisions of the act, employee protection may be established by agreement between a railroad and the unions representing its employees. Consequently, except to find, as we do, that the agreement of May 20, 1964 does not render the proposed transaction inconsistent with the public interest, we can make no requirement as to the protection of employees covered by the agreement.

See also *Great Northern Pac. & B. Lines Merger—Great Northern*, 331 I.C.C. 228, 279.

[43] *United States* v. *Lowden*, 308 U.S. 225.

tion.[44] To avoid a conflict with Section 5(2)(f), however, it is a power that must be used sparingly—for example, to condition the approval of a transaction that would otherwise be disapproved because of an element contrary to the public interest such as invidious discrimination against a class of employees. In the present case the Commission has not been requested to exercise its authority under Section 5(2)(b) to impose such additional terms. In the meantime the rights of employees covered by the agreements here, including plaintiffs, flow from the collective agreements and not from any order of the Commission under Section 5(2)(f).

Since plaintiffs' rights to protection derive from the 1962 and other private agreements, they could not seek damages against the carrier for an alleged violation of a Commission order. The district court therefore did not have jurisdiction of plaintiffs' action under 49 U.S.C. 8 and 9.

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[44] *Railway Labor Assn.* v. *United States*, 339 U.S. 142.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it held the district court had jurisdiction under the Interstate Commerce Act.

Respectfully submitted.

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